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No.

In The

Supreme Court of the United States

October Term, 1996

ROSA BECERRA, individually and as next friend of JUAN DOE, a minor,

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, JOAN RAYMOND, SYLVIA MACY and BARBARA TURNER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

From 1975 until 1992, Jerry Asher, a teacher at the Houston Independent School District ("HISD"), sexually molested prepubescent male students both on and off school campuses. HISD and school officials were well aware of Asher's sexual impropriety with young boys during his seventeen year tenure at HISD, yet undertook absolutely no action to correct or prevent Asher's sexual assault of young boys other than to repeatedly transfer him from school to school after his continued sexual deviance became evident. This case involves the sexual assault of Asher's last *known* victim and the following constitutional issues presented below:

Does a prepubescent elementary school student have a constitutionally protected right under the Due Process Clause of the Fourteenth Amendment of the United States Constitution to be free from sexual seduction and psychological manipulation which results in sexual abuse by a school teacher?

Can school officials be held liable under 42 U.S.C. § 1983 for failing to supervise a teacher and failing to report and investigate improper conduct by a teacher when such failure results in the deprivation of a child's constitutional rights?

LIST OF ALL PARTIES

The Petitioners are Rosa Becerra, individually and as next friend of Juan Doe, a minor;

The Respondents are Houston Independent School District; Joan Raymond, the former superintendent of Houston Independent School District; Sylvia Macy, assistant superintendent of Houston Independent School District; and Barbara Turner, a principal at Houston Independent School District.

Jerry Asher, a former teacher at Houston Independent School District, was a defendant in the underlying lawsuit but is not a party to this appeal.

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Rosa Becerra, individually and as next friend of Juan Doe, a minor, petitions for a writ of certiorari, asking the Court to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court's order granting summary judgments filed by the Houston Independent School District, Joan Raymond, Sylvia Macy and Barbara Turner.

OPINIONS BELOW

This case arises from summary judgments granted by the United States District Court for the Southern District of Texas, Houston Division, in Civil Action No. H-94-4222. The United States Court of Appeals affirmed the district court's opinion and such opinion is reported at 105 F.3d 1042 (5th Cir. 1997). The Fifth Circuit's per curiam opinion denying Becerra's petition for rehearing and rehearing en banc is also reported at 105 F.3d 1042 (5th Cir. 1997). Copies of the district court's judgment and the Fifth Circuit's opinions are reprinted in the Appendix to this petition.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Becerra's petition for rehearing and rehearing en banc on March 27, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

A substantive due process right to bodily integrity has been found to protect a child from the physical sexual abuse by a school teacher. U.S. Const., amend. XIV.

At the time the lawsuit was filed, 42 U.S.C. §-1983 provided:[1]

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a case of first impression for this Court to determine whether a prepubescent elementary student has a constitutionally protected right under the Due Process Clause of the Fourteenth Amendment to be free from the sexual seduction, psychological manipulation and exploitation by a school teacher. Also, this case seeks this Court's guidance on the standards applied to school district officials' liability under 42 U.S.C. § 1983 for failing to supervise and failing to report and investigate the conduct of a teacher when such failure deprives a student of rights protected by the Due Process Clause of the Fourteenth Amendment.

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1. The underlying cause of action was filed in 1994. In 1996, 42 U.S.C. § 1983 was amended and the language "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable" was added. However, the statute as it existed in 1994 is applicable herein.

This case began as an action brought under federal and state law against the Houston Independent School District, certain district officials and Jerry Asher, an HISD school teacher, for the deprivation of Juan Doe's constitutional rights under the Due Process Clause of the Fourteenth Amendment. Becerra alleges that her minor son, Doe, was deprived of his right to be free from sexual seduction and psychological manipulation by his elementary music teacher, Jerry Asher. While the case was still on the pleadings, before sufficient discovery had been completed and while the child was undergoing psychological counseling, the school district and the individual officials moved the district court for summary judgment claiming that the sexual abuse of Juan Doe did not occur under color of state law under 42 U.S.C. § 1983 and asserted the defense of qualified immunity. The district court granted summary judgment on behalf of HISD and the HISD officials. The district court improperly held that because Asher's physical sexual assault of Juan Doe did not occur under color of state law, Becerra had no valid claim against HISD and its officials under 42 U.S.C. § 1983.

The Fifth Circuit affirmed and held that a school child does not have a substantive due process right to be free from sexual seduction by a school teacher. The Fifth Circuit's decision deprives sexual abuse victims of any protection short of actual physical violation by a state actor. This result cannot stand.

A. Asher's Sexual Seduction And Molestation Of Juan Doe

From 1990 through 1992 Juan Doe attended J.R. Harris Elementary School where Jerry Asher was a music teacher. Doe attended music class with Asher twice a week for two years. During this period, Asher befriended Juan, paid special attention to Juan in class, gave Juan expensive gifts, including a keyboard which was used in music class, gave Juan money, allowed Juan to win in-class contests that he did not legitimately win, awarded

Juan high marks, yet did not require Juan to complete assignments, and instructed Juan to sit next to him on the piano bench during music class. After Asher won Juan's confidence, he started hugging Juan and touching Juan's body in the classroom. Eventually, Asher asked Juan to stay after school for "music lessons" during which Asher fondled Juan's genitals. Asher's "grooming", sexual seduction and psychological manipulation of the young Doe escalated to the physical sodomization and rape of Juan Doe. Both the sexual seduction and physical sexual abuse are violations of Juan Doe's constitutional rights protected under the Due Process Clause of the Fourteenth Amendment. Asher used his position and authority as Doe's teacher to sexually seduce and psychologically manipulate Juan Doe. The sexual seduction and psychological manipulation of Doe resulted in the physical sexual abuse and sodomization of Juan Doe. Asher's sexual seduction and psychological manipulation of Doe was intentional and methodical and predictably resulted in the physical sexual abuse of Juan Doe.

B. Asher's Sordid History At HISD

Juan Doe was not Asher's first victim at HISD. Asher had a long, sordid history of sexual seduction and physical abuse of elementary school boys at Houston Independent School District. Asher began his career and his sexual seduction of young boys at HISD in 1975 at Bastain Elementary. Asher sexually seduced and eventually sexually assaulted at least two (2) Bastain Elementary boys. Asher admitted to such conduct at Bastain (6R 1213 ln. 10-21). However, he was not held accountable for his actions by HISD. Asher was transferred to Sunnyside Elementary, where again he had sexual contact with HISD students, but was still not held accountable for his actions (6R 1213 ln. 10-21). In fact, Asher was given excellent teacher evaluations at both schools in order to facilitate the transfers.

Asher was transferred to a third HISD school, Frost Elementary School, where again he engaged in sexual seduction and imminent sexual molestation of young male students. In 1987, while at Frost, Asher was arrested and charged with indecency with a child for the *undisputed* acts of putting his hands into the pants of a young, mentally challenged school student and fondling the child's buttocks and inner thighs. Asher was acquitted of criminal charges because the mentally challenged boy was unable to testify about the fact that Asher did in fact fondle the child's genitalia. It is undisputed that Asher's molestation of the young Frost student occurred on school grounds. Notwithstanding Asher's admissions under oath of which HISD had knowledge, HISD undertook no investigation and placed Asher back into the classroom. Asher received no repercussions by HISD. Instead, HISD, once again gave Asher excellent teacher evaluations and transferred Asher to yet another HISD school, Patterson Elementary.

At Patterson, Asher's strange sexual behavior with children continued. While at Patterson, Asher inspected the body of a student, asked little children about their alleged sexual abuse, disrupted a faculty meeting to explain rumors about his sexual misconduct, revealed that he had discovered a child that had been sexually abused "anally and orally", and wrote a rambling and unintelligible letter to his principal, Barbara Turner, describing a sexually abused child. Asher's conduct was so strange that teachers at Patterson complained to Turner that they were concerned about Asher's contact with children and stressed to Turner that they did not want Asher to be alone with any student. As a result of Asher's conduct, Turner requested that Asher undergo a medical evaluation. However, an evaluation never took place. Although Sylvia Macy, HISD's assistant superintendent at the time, was aware of Asher's deviant conduct at Patterson, she ignored the obvious signs of Asher's perversion. Neither Turner nor Macy undertook an investigation of Asher

or an investigation to determine the identity of the described child victims. Instead, despite Asher's glaring psychological problems and improper conduct with students, Turner gave Asher excellent evaluations to facilitate Asher's transfer from Patterson. Macy approved Asher's transfer to J.R. Harris Elementary where he met Juan Doe. Both Macy and Turner took an "out of sight, out of mind" approach to Asher's problems.

Asher used his position of authority as a teacher to sexually seduce and eventually sexually assault vulnerable students at HISD, including Juan Doe. Asher's sexual impropriety with HISD students and his reign of terror at HISD was blatant and predictable, yet HISD and certain HISD officials ignored Asher's irrefutable signs of pedophilia and subjected the young HISD students to deprivation of clearly established substantive due process rights.

C. The Lawsuit

Becerra, individually and as next friend of Juan Doe, filed suit against HISD, Barbara Turner, Sylvia Macy, Joan Raymond and Asher under 42 U.S.C. § 1983 and various state law causes of action. Becerra alleged that HISD and its officials were deliberately indifferent to the rights of Juan Doe to be free from sexual abuse by his teacher. Becerra relied upon Fifth Circuit precedent, *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1993) (*en banc*), *cert. denied*, __ U.S. __, 115 S. Ct. 70, 130 L. Ed. 2d 25 (1994), for the basis of Doe's constitutional protection to be free from sexual abuse by a school teacher.

Becerra asserted that HISD and its individual officials were liable because their acts promoted, condoned, encouraged and sanctioned Asher's unconstitutional conduct. Despite clear and undisputable signs of sexual impropriety with students, HISD

and the individual officials arrogantly turned a blind eye to the protection of elementary students. HISD and its official's conduct by ignoring Asher's prior sexual abuse of a child and Asher's continued misconduct with children was a direct cause or "nexus" of Asher's sexual seduction and inevitable sexual assault of Juan Doe.

D. Summary Judgment

HISD and certain of its officials sought summary judgment claiming that Asher was not acting under color of state law because the only ***physical*** sexual abuse of Doe occurred during the summer months. Because Asher was not acting under color of state law, neither HISD nor its officials could be held responsible under 42 U.S.C. § 1983. The HISD officials also sought summary judgment based on qualified immunity. Becerra's response included clear evidence of the deprivation of Juan Doe's substantive due process right. Additionally, Becerra presented evidence of HISD's and its officials' intentional indifference to the constitutional rights of school students, including, testimony that HISD and its officials knew Asher was a threat to young students, completed positive teacher evaluations despite knowledge of Asher's improper conduct with students, and proffered evidence of Asher's prior criminal charges of indecency with a child.

Becerra also presented Asher's deemed admissions in support of her response to the summary judgments. Becerra did not offer Asher's admissions to be used against HISD or its officials, but rather to create fact issues relating to Asher's conduct with students and HISD's knowledge regarding same. The district court refused to consider Asher's admissions for any purposes.

The district court granted summary judgment on behalf of

HISD and its officials. The district court refused to extend the substantive due process right to protect elementary students from the sexual seduction and psychological manipulation by Asher which undeniably resulted in the physical sexual assaults of Juan Doe.

E. Trial On The Merits Against Asher

Becerra's claims against Asher under 42 U.S.C. § 1983 and various state law claims were not dismissed. A jury trial on the merits occurred and Juan Doe testified that Asher sexually seduced and physically sexually assaulted him while Asher was his teacher at J.R. Harris. Additionally, the young Doe testified that Asher fondled his genitalia on school grounds during piano lessons. The jury found that Asher acted under color of state law.

F. The Fifth Circuit Opinion

The Fifth Circuit affirmed the district court's order granting summary judgment on behalf of HISD and certain HISD officials. The Fifth Circuit concluded: (1) that school children have a liberty interest in their bodily integrity that is protected by the due process clause of the Fourteenth Amendment; (2) that Asher's conduct did not occur under color of state law; (3) that there was no real nexus between the activity out of which the violation occurred and Asher's duties and obligations as a teacher; and (4) that the Fourteenth Amendment only protects school children from ***physical*** **sexual abuse** by a school teacher.

The Fifth Circuit failed to recognize Asher's prior sexual conduct with HISD students, failed to recognize HISD's total apathy towards Asher's unconstitutional conduct, failed to recognize HISD officials' intentional indifference to the rights of young students, including Doe, and failed to recognize HISD's

and its officials complete dereliction to supervise Asher and investigate blatant signs of sexual impropriety. The Fifth Circuit refused to extend constitutional due process protection to students to be free from the sexual seduction and psychological manipulation by a school teacher. Thus, the Fifth Circuit has denied any real constitutional protection to elementary school students from sexual abuse at the hands of a school teacher.

REASONS FOR GRANTING THE WRIT

This is a case of first impression. As a result of the Fifth Circuit's opinion, it is clear that prepubescent school children have no constitutional protection from the sexual seduction, psychological manipulation and exploitation by school teachers. The Fifth Circuit's opinion requires that a child be *physically* violated before he is afforded any protection under the Due Process Clause of the Fourteenth Amendment from a state actor. This should not and cannot be. The Fifth Circuit's decision narrowly construes the rights announced in *Doe v. Taylor Independent School District* and disregards other circuit's opinions regarding a child's constitutional right to be free from sexual abuse and psychological harm. This result leaves prepubescent students with no constitutional protection from pedophiles who unfortunately invade this country's school systems. The Court cannot replicate the actions of the Fifth Circuit and turn a blind eye to vulnerable elementary students.

I.

PREPUBESCENT ELEMENTARY SCHOOL CHILDREN ENJOY A CONSTITUTIONALLY PROTECTED RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO BE FREE FROM SEXUAL SEDUCTION BY A SCHOOL TEACHER.

The Fifth Circuit's opinion leaves elementary school children with no protection from sexual seduction and psychological manipulation which irrefutably results in the physical sexual assault of young students. Sexual seduction and psychological manipulation of a prepubescent child are predicable and necessary prerequisites to the imminent sexual assault by a pedophile. Because sexual maturity of an elementary child has not developed, a pedophile sexually seduces the child by gaining the child's trust and confidence and bestowing gifts and special attention upon the child. This sexual seduction or "grooming" of prepubescent children inevitably leads to the sexual abuse of the child. The increased vulnerability of prepubescent elementary school students and the greater custodial responsibility of schools over these young impressionable children demand a heightened level of protection from in-school sexual seduction, psychological manipulation and abuse. Such protection must be greater than that afforded to high school students because of the absence of sexual maturity in such young children. To require evidence of "dating" and "intercourse" with elementary students before affording constitutional protection is to deny these students protection altogether. The law must keep up with the real world. Elementary school children are entitled to education without sexual seduction by the teacher.

This Court has recognized that the state's interest in

"safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 759, 756-757, 102 S. Ct. 3348, 3354, 73 L. Ed. 2d 1113 (1982); *Globe Newspaper Company v. Superior Court for the County of Norfolk*, 457 U.S. 596, 607, 102 S. Ct. 2613, 26, 20, 73 L. Ed. 2d 248 (1982). In determining the protection that should be afforded the child, the minor's age is a factor to be weighed. *Globe Newspaper*, 457 U.S. at 608, 102 S. Ct. at 2621. The younger the child, the greater the need for protection. Furthermore, the Texas legislature, and other states as well, have acknowledged the need to protect students from sexual abuse by state actors. Consequently, Texas passed a specific law requiring school districts to implement anti-victimization laws for elementary students. Tex. Educ. Code Ann. § 38.004(b) (Vernons Supp. 1996).

The concept of substantive due process is not fixed or final, but is generally accorded to matters relating to marriage, family procreation, and the right to bodily integrity. *Albright v. Oliver*, __ U.S. __, 114 S. Ct. 807, 812, 127 L. Ed. 2d 114 (1994). The Fifth Circuit's opinion disregards the young Doe's right to bodily integrity to be free from sexual seduction and psychological manipulation and confines Doe's constitutional rights to protection from only ***physical*** sexual abuse. If a child is to have any protection, such protection must commence as early as the "injury" begins: i.e., when the child is rendered susceptible and vulnerable by state action to sexual manipulation by a school teacher. Sexual seduction and psychological manipulation are essential in order for sexual abuse of a prepubescent child to occur. Must a child be sexually violated before he is "protected" by the Constitution? Must a black man be hung from a tree before his constitutional rights are actionable? Must a woman be raped by her supervisor before she can enjoy constitutional protection? Despite the obvious answer to these questions, the Fifth Circuit's opinion, if allowed to prevail, would require

physical sexual assault of an elementary student before recognizing constitutional protection for the student. Such holding provides no protection at all in the elementary school setting and defies this Court's pronouncement that the protection of children's physical and psychological well-being is compelling. *New York v. Ferber*, 458 U.S. 759, 756-757, 102 S. Ct. 3348, 3354, 73 L. Ed. 2d 1113 (1982); *Globe Newspaper Company v. Superior Court for the County of Norfolk*, 457 U.S. 596, 607, 102 S. Ct. 2613, 26, 20, 73 L. Ed. 2d 248 (1982).

Circuits which have addressed the issue have held that school children enjoy a protected liberty interest in their bodily integrity under the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school teacher violates that right. *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994), *cert denied*, __ U.S. __, 115 S. Ct. 50, 130 L. Ed. 2d 25 (1994); *Doe v. Clairborne County, Tennessee*, 103 F.3d 495 (6th Cir. 1996); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1044, 110 S. Ct. 840, 107 L. Ed. 2d 835 (1990); *Abeyta v. Chama Valley Independent School District*, 77 F.3d 1253 (10th Cir. 1996). This right must be greater than protection from only physical sexual abuse.

In *Doe v. Taylor Independent School District*, Judge Higginbotham, in his concurring opinion, indicated that a child's liberty interest in his or her bodily integrity protects "a student from one who uses his authority to sordid sexual ends." *Id.* at 459. Judge Higginbotham went on to add that a teacher's use of his position of authority to pressure and manipulate a student into sex could be nothing but arbitrary and capricious. *Id.* at 460. In fact, the "deeper the mark of disapproval that state and federal civil and criminal law have placed on [the teacher's] acts, the stronger the case that Doe's liberty interest is fundamental." *Id.* at 460. The state never has a legitimate basis

for inflicting physical sexual abuse on a child. *Id.* at 461. Similarly, the state clearly has no legitimate basis for subjecting a child to sexual seduction and psychological manipulation by a teacher. Furthermore, the majority in *Doe v. Taylor Independent School District*, indicated that the coach took full advantage of his position as a teacher to ***seduce*** Doe. *Id.* at 452.

The Fifth Circuit's decision in this case conflicts with the Seventh Circuit in *K.H. by and through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). In *K.H.*, Judge Posner extended substantive due process protection to a person's mental health. Two caseworkers with the Illinois welfare program knew that a foster parent was incompetent yet still placed the young child in the home. The foster parent sexually and psychologically abused the child. The learned Court opined that "[I]f . . . the defendants must have known they were placing K.H. in a sequence of foster homes that would be destructive to her mental heath, the ingredients of a valid constitutional claim are present." *Id.* at 850. Even before *K.H.*, the Seventh Circuit recognized that a child possesses a substantive due process right not to be psychologically abused. Such right is even more clear when physical injury is a probable result of the psychological abuse. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979).

The Tenth Circuit also recognized that a child possesses a substantive due process right to be free from psychological abuse in certain circumstances. *Abeyta v. Chama Valley Independent School District*, 77 F.3d 1242 (10th Cir. 1996). However, the Court provided no guidance under what circumstances such right would be violated.

This Court should now provide a definitive answer as to whether the substantive due process right to bodily integrity includes the right to be free from sexual seduction and psychological manipulation which results in physical sexual

abuse by a school teacher. If a child's physical and psychological well-being are not protected and state actors are allowed to prey upon vulnerable students, schools will be allowed to be luring parlors and dating services for pedophiles. If the Fifth Circuit's opinion is allowed to prevail, students will stand as fawns in the cross-hairs of a poacher's rifle.

II.

THE ACTIONS OF HISD, JOAN RAYMOND, SYLVIA MACY AND BARBARA TURNER VIOLATED JUAN DOE'S CONSTITUTIONAL RIGHTS.

The Fifth Circuit's opinion fails to recognize that HISD and the individual officials are liable under 42 U.S.C. § 1983 for their deliberate tolerance and inaction regarding Asher's rampant sexually improper conduct toward elementary students. The decision fails to acknowledge that HISD and the individual officials failed to supervise Asher which was a direct result of the deprivation of Juan Doe's constitutional rights. Section 1983 provides that every person who "subjects, or ***causes to be subjected***" any citizen to the deprivation of constitutional rights may be liable for such deprivation. 42 U.S.C. § 1983.

Although other circuits, even the Fifth Circuit in *Doe v. Taylor Independent School District*, have applied a "failure to supervise" theory of liability upon governmental officials, the Fifth Circuit's opinion wholly fails to address Becerra's claims against HISD and its supervisory officials.

Specifically, the Eighth Circuit has recognized that a supervisor may be held individually liable under 42 U.S.C. § 1983 because he failed to supervise the offending employee which resulted in the deprivation of a person's constitutional rights. *Andrews v. Fowler*, 98 F.3d 711 (8th Cir. 1996) (fact issue

existed regarding supervisors' failure to act on prior complaints of sexual misconduct by employee and failure to supervise employee precluding summary judgment). The Fourth Circuit has also determined that Section 1983 liability against an individual official is available for failure to supervise an employee. *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983). This opinion even ignores an earlier ruling by the Fifth Circuit. *Doe v. Taylor Independent School District.* It is clear that governmental officials violate a person's constitutional rights by acquiescing to, condoning, ignoring and sanctioning an offending employees' deprivation of a constitutional right.

This Court has acknowledged a "failure to supervise" claim for official liability under Section 1983 indicating that such conduct could give rise to official liability. *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976); *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Furthermore, this Court has addressed a "failure to train" allegation under Section 1983 and provided standards upon which to rely for official liability. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). However, there is no clear pronouncement by this Court regarding the standards and applicability of failure to supervise a teacher in a school setting imputing liability under 42 U.S.C. § 1983 to the supervisory official.

The continued lack of defined standards will result in confusion in the lower courts. If uncertainty among the circuits prevails with no real guidance by this Court, potential harm to litigants, including Juan Doe, is imminent. The Court has planted the seed and now must assist in the cultivation. The lack of uniformity and lack of standards for official liability for failure to supervice under Section 1983 in a school setting needs to be corrected.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED FEBRUARY 14, 1997

ROSA BECERRA, INDIVIDUALLY AND AS NEXT FRIEND OF JUAN DOE, A MINOR,

Plaintiff-Appellant,

v.

JERRY ASHER, ET AL.,

Defendants,

HOUSTON INDEPENDENT SCHOOL DISTRICT, JOAN RAYMOND, SYLVIA MACY AND BARBARA TURNER,

Defendants-Appellees.

No. 96-20401.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1997.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before POLITZ, Chief Judge, and REAVLEY and DENNIS, Circuit Judges.

REAVLEY, Circuit Judge:

Appendix A

Defendant Jerry Asher, a music teacher with the Houston Independent School District (HISD), sexually molested Juan Doe, an eleven-year old boy. Juan's mother, Rosa Becerra, individually and as next friend of Juan, brought this action against Asher, three HISD administrators, and HISD, alleging a federal claim under 42 U.S.C. § 1983 and state law claims. The court granted summary judgment in favor of all the defendants except Asher on the § 1983 claim, and entered a final judgment in favor of these defendants under Fed.R.Civ.P. 54(b)[1] Because we agree with the district court that the sexual assault by Asher was not state action, we affirm.

BACKGROUND

Asher was a teacher with HISD from 1975 to 1992. In 1987 he was charged with indecency with a child arising from an incident at Frost Elementary. Then HISD superintendent, defendant Joan Raymond, suspended Asher because of the charge, but he resumed teaching after his acquittal. After the acquittal Asher was transferred to Patterson Elementary. While at Patterson, the principal, defendant Barbara Turner, heard that Asher planned to give private music lessons in his classroom, that he had questioned students about personal matters, and that he had asked a student to roll up his pants so that Asher could examine his leg for signs of physical abuse. Turner told Asher not to engage in such activities. Asher also disrupted a faculty meeting and tried to initiate a group prayer to quell rumors about the prior indecency charge. Turner reprimanded Asher for this behavior and recommended that he receive a medical evaluation, but this recommendation went unheeded. Turner wanted Asher

1. The state law claims were dismissed without prejudice under 28 U.S.C. § 1367, which allows the court to decline to exercise supplemental jurisdiction after the sole federal claim is dismissed.

transferred to another school. Becerra complains that Turner gave Asher an excellent teacher evaluation to facilitate his transfer.

In July 1990, Defendant Sylvia Macy, an area superintendent, authorized Asher's transfer to Harris Elementary. Juan Doe attended Harris elementary from 1990 to 1992. He was a student in Asher's music class. On March 9, 1992, Juan withdrew from Harris Elementary, but Juan and his brother continued a friendship with Asher. With their mother's permission, the boys spent time with Asher. Their activities included home music lessons, trips to the zoo and theme parks, and church activities. On August 29 and September 12, 1992, Asher was alone with Juan and his brother at their home, and sexually molested Juan. Juan's grandmother witnessed the latter incident. Becerra reported Asher to the authorities. He resigned from HISD in December of 1992, pleaded guilty to child molestation, and was sentenced to 50 years in prison.

Becerra sued under § 1983, alleging a violation of Juan's substantive due process right to bodily integrity, and a violation of his right to equal protection because of an HISD policy of transferring troubled teachers to largely minority schools. The equal protection claim was abandoned on appeal. Becerra complained, *inter alia,* that for years before the assaults on Juan, Asher was a known threat to his students and had committed numerous sexual acts with minor students. She complained that the sexual abuse of Juan occurred as a result of the conduct and deliberate indifference of HISD and its officials, that HISD failed to train and supervise its employees to prevent sexual misconduct, and that defendants adopted a policy of transferring Asher and other pedophiles from one school to another, rather than terminating them. The district court, after allowing limited

discovery on the issue of qualified immunity, granted summary judgment in favor of the appellees.

DISCUSSION

Doe v. Taylor Indep. Sch. Dist.[2] is our circuit's seminal case on the subject of § 1983 liability for sexual misconduct in the school setting. This decision made three important holdings. We held that "schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right."[3] We further held, for purposes of analyzing the qualified immunity defense, that this right was clearly established.[4] In addressing vicarious liability, we recognized that local governments and supervisory personnel are not subject to § 1983 liability under a vicarious liability or respondeat superior theory.[5] However, we held that these defendants could be held liable, under a "deliberate indifference" standard, if they demonstrated deliberate indifference toward the constitutional rights of the student.[6]

A. *State Action*

Although the law is clear that physical sexual abuse of a

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2. 15 F.3d 443 (5th Cir.) (en banc), *cert. denied*, __ U.S. __, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994).

3. *Id.* at 445.

4. *Id.* at 454-56.

5. *Id.* at 452.

6. *Id.* at 453-54.

student by a school teacher can give rise to § 1983 liability, a separate and essential element of such a claim is that the abuse occur under color of state law. "To state a claim under § 1983, the plaintiff . . . must show that the alleged deprivation was committed by a person acting under color of state law."[7] When, as here, the alleged constitutional violation is a violation of the Due Process Clause of the Fourteenth Amendment, this requirement flows both from the "state action" component of the Fourteenth Amendment and the "under color of" state law requirement of § 1983.[8] The "state action" and "under color of state law" requirements are identical in this context.[9]

As egregious and cruel as Asher's acts were, liability under § 1983 is necessarily limited to constitutional violations occurring under color of state law. "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[10] The Supreme Court has rejected an approach that would make "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[11]

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7. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988).

8. *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406 (5th Cir.1995).

9. *Id.*

10. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665-66, 88 L.Ed.2d 662 (1986).

11. *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-61, 47 L.Ed.2d 405 (1976).

Doe v. Taylor addressed this issue. That case involved the sexual abuse of a student by a teacher, Stroud, who was a coach and biology teacher. It was no secret in the school community that Stroud behaved inappropriately towards female students.[12] The principal was aware of this behavior.[13] The teacher befriended the plaintiff, a high school freshman, and the two began exchanging notes at school. He gave her gifts, took her to lunch during the school day and walked her to class. In his biology class plaintiff was not required to take tests or do class work.[14] The two engaged in sex "both on and off the school grounds."[15]

The majority opinion in *Doe v. Taylor* discusses the state action requirement in footnote 4:

> Lankford and Caplinger argue first that Stroud's actions were not taken under color of state law. They rely on *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176 (10th Cir.)[*cert. denied*, 498 U.S. 879, 111 S.Ct. 213, 112 L.Ed.2d 172 (1990)], in which a teacher molested three students during the summer while engaged in a fundraising campaign for a basketball camp. The school made it clear to the teacher that the fundraising activity was not a school program but rather was organized as a

12. *Doe v. Taylor*, 15 F.3d at 446.

13. *Id.*

14. *Id.* at 447.

15. *Id.* at 448.

community volunteer effort. In this case, however, Stroud took full advantage of his position as Doe's teacher and coach to seduce her. He required Doe to do little or no work in the classroom and still gave her A's. He also spoke to one of Doe's other teachers about raising her grade in that class. Stroud was also Doe's basketball coach and he exploited that position as well. The first physical contact Stroud had with Doe was after a basketball game in November 1986 when he grabbed her and kissed her. Stroud's physical contact with Doe escalated thereafter. During the next several months Stroud took Doe from his classroom to an adjoining lab room where he kissed and petted her. During that same period of time Stroud also met Doe in the school's fieldhouse where similar activity took place. As the court in *D.T.* recognized, if a "real nexus" exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher, then the teacher's conduct is taken under color of state law. *Id.* at 1188. As demonstrated by the above facts, the nexus that was missing in *D.T.* was clearly present in this case. We therefore reject the school officials' argument that Stroud's acts were not under color of state law.[16]

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16. *Id.* at 452 n. 4.

Appendix A

Judge Higginbotham, in his concurring opinion, agreed that state action existed for the following reasons:

> The next inquiry is whether the deprivation of liberty occurred under color of state law. I agree that it did. Stroud's official interactions with Doe and his sexual involvement with her together constituted an indivisible, ongoing relationship. The special attention Stroud gave Doe as her teacher afforded him the opportunity to exert his influence. He levered his authority to press upon Doe his sexual desires, while both on and off school grounds. He treated Doe differently than he treated other members of his class. He gave her good grades, required of her less work than other students, and allowed her to behave as she liked in his classróom. This manipulative course was an abuse of power conferred by the state. I am persuaded that Stroud acted under color of state law. Judge Garwood's dissent commendably recognizes the relevance of this inquiry but contests this conclusion, relying on [*D.T.*], where a school coach was held not to have acted under color of state law when engaging in sexual activity with students. Unlike the defendant in *D.T.*, however, Stroud was Doe's teacher before, during, and after their sexual liaison. *See id.* at 1191 (emphasizing that teacher was on vacation when molestation occurred in

reaching conclusion that he did not act under color of state law).[17]

Significantly, both the majority opinion and the concurring opinion quoted above have no quarrel with the reasoning of the Tenth Circuit in *D.T.*, but find the case distinguishable. Judge Garwood's dissent also cites *D.T.* with approval.[18]

In *D.T.*, a teacher allegedly molested three students during the summer while engaged in a fundraising trip for a basketball camp that was not sponsored by the school. Although flyers had been circulated on school grounds regarding the camp, and a basketball game had been played on school grounds to raise money for the camp,[19] the court held that the sexual misconduct had not occurred under color of state law.

We conclude that Asher's sexual assault on Juan Doe did not occur under color of state law. Our case is much closer to *D.T.* than *Doe v. Taylor.* The evidence of Asher's assaults in the summary judgment record includes the testimony of Juan, his mother and Asher at Asher's sentencing hearing in state court. We have carefully reviewed this evidence. The testimony indicates that the physical sexual abuse of Juan by Asher occurred on two occasions, August 29 and September 12, 1992. Asher, for example, testified that he was "friendly, pleasant, and gift-giving" toward Juan "until the end when I fell." He then

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17. *Id.* at 461-62 (Higginbotham, J., specially concurring) (citations omitted).

18. *Id.* at 466-67 & n. 4 (Garwood, J., dissenting).

19. *D.T.*, 894 F.2d at 1183.

answered questions from the prosecutor "about the first sexual act on August the 29th."[20]

The assaults occurred at Juan's home. Asher first molested

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20. Becerra moved for a new trial after the court granted summary judgment, attaching affidavits of Juan and Juan's psychiatrist. Becerra does not specifically complain on appeal that the court erred in denying the motion for new trial, but does discuss statements made in the two affidavits, and complains that the district court erred in disregarding the psychiatrist's affidavit. We review the district court's denial of a motion for new trial under the abuse of discretion standard. *Bailey v. Daniel*, 967 F.2d 178, 179-80 (5th Cir.1992). When a party offers alleged newly-discovered evidence, the district court should consider whether the omitted evidence was available to the moving party prior to the time for filing his response to the summary judgment motion. *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 174-75 (5th Cir.1990), *cert. denied*, 510 U.S. 859, 114 S.Ct. 171, 126 L.Ed.2d 131 (1993). The two affidavits were first filed on February 13, 1996, the same day the court signed its order granting the summary judgment. Although the expert opined that "[i]t is typical that a victim who has undergone such sexual trauma as Juan has would try to suppress details as much as possible." Juan testified in detail regarding his sexual abuse at Asher's state court trial in 1993, and his own affidavit states that "I wish I could forget, but I can't." The affidavits contained information peculiarly within the control of the plaintiff. As early as April of 1995, plaintiff alleged in her second amended complaint that Asher had fondled Juan in a classroom, and alleged in her August 1995 third amended complaint egregious sexual abuse "both in class and off-campus." Further, we agree with the district court that Juan's affidavit only made "vague references to unspecified touching of Juan in class by Asher." For example it stated that Asher "first started touching my body lightly while in class." Similarly, the expert stated, based on revelations made by Juan, that Juan "felt that Mr. Asher had crossed the line and violated his preferred physical distance and was invading his 'personal space.' " This evidence, even if deemed timely, does not establish that physical sexual abuse occurred at school, during the period when Asher was Juan's teacher. Given the timing and substance of the new evidence, we cannot say that the court abused its discretion in denying the motion for new trial.

Juan more than five months after Juan withdrew from the school where Asher taught. Asher's contacts with Juan thereafter were in no way part of his duties as a state employee, were not school-sponsored, and were not reported to any school official. While there was evidence that Asher had first befriended and shown a special interest in Juan at school, there was no competent summary judgment evidence of physical sexual abuse at the school. Unlike in *Doe,* Asher was not Juan's teacher "before, during, and after" the sexual abuse, or was this wrongful conduct "on and off school grounds." On this evidence we hold that there was no " 'real nexus' . . . between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher," as *Doe* requires.[21]

Plaintiff offered expert affidavits to the effect that the seduction of Juan began at school, and the later sexual abuse would not have occured if Asher had not first won Juan's trust and affection while serving as his teacher. However, in *Doe v. Taylor,* our court, cognizant that the Due Process Clause should not be interpreted as a "font of tort law to be superimposed upon whatever systems may already be administered by the States,"[22] was very clear in its holding that the constitutional violation did not extend to the development of trust and affection.[23]

Because Asher's physical sexual abuse of Juan did not occur under color of state law, there was no state action and no violation of Juan's constitutional rights. It necessarily follows

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21. *Doe v. Taylor,* 15 F.3d at 452 n. 4.

22. *Paul,* 424 U.S. 693 at 701, 96 S.Ct. 1155 at 1160-61, 47 L.Ed.2d 405.

23. *Doe v. Taylor,* 15 F.3d at 445, 450, 451, 454.

that, without an underlying *constitutional* violation, there can be no § 1983 liability imposed on the school district or the individual supervisors. *Doe v. Taylor* requires, as a separate element of supervisor liability, that the supervisor's deliberate indifference "caused a *constitutional* injury to the student."[24] In addressing municipal liability, the Supreme Court has stated that "proper analysis requires us to separate two different issues when a § 1983 claim is asserted . . . (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation."[25] Without an underlying constitutional violation, an essential element of municipal liability is missing. As our court has explained, "[a]fter finding that (1) a rights violation occurred (2) under color of state law, only then do we ask a third and final question: Who are the state actors responsible for the constitutional violation?"[26]

B. *Other Issues*

Becerra complains that the district court abused its discretion in limiting discovery prior to granting summary judgment. She argued to the district court that defendants' summary judgment motions should not be considered before the deposition of defendant Raymond and other school officials, but there is no indication in the record that these witnesses had personal information about Asher's sexual abuse of Juan not otherwise available to Juan or his mother. A party seeking continuance of a motion for summary judgment in order to obtain

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24. *Id.* at 454 (emphasis added).

25. *Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S.Ct. 1061, 1065-66, 117 L.Ed.2d 261 (1992).

26. *Doe v. Rains*, 66 F.3d at 1402.

further discovery must show "why he needs additional discovery and *how* the additional discovery will create a genuine issue of material fact."[27] Becerra does not meet this burden.

Becerra also complains that the court erred in not considering Asher's deemed admissions as evidence against the other defendants. When the requests for admissions were propounded upon Asher, he was in prison, representing himself. He failed to answer the requests for admissions. The requests asked Asher to admit or deny that he had engaged in various acts of sexual misconduct "while a teacher at" several schools, and that he had sexual contact with Juan "while he was a teacher at HISD," "while a teacher at HISD," or between 1987 and December 1992. There was no error in disregarding these admissions. Deemed admissions by a party opponent cannot be used against a co-party.[28] Further, the requests for admissions only asked about sexual contacts by Asher "while a teacher at HISD." Hence they do not shed light on the critical inquiry of whether the contacts with Juan occurred at school or elsewhere, or whether they occurred at the time Asher was Juan's teacher or in the course of school-sponsored activities.

AFFIRMED.

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27. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993) (emphasis in original).

28. *Riberglass, Inc. v. Techni-Glass Indus., Inc.*, 811 F.2d 565, 566 (11th Cir.1987); 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2264 at 571-72 & 580 (1994).

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED FEBRUARY 14, 1996

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-4222

ROSA BECERRA, Individually and as Next Friend of JUAN DOE, a Minor,

Plaintiff,

v.

JERRY ASHER, HOUSTON INDEPENDENT SCHOOL DISTRICT, by and through its Board of Trustees, JOAN RAYMOND, SYLVIA MACY, and BARBARA TURNER,

Defendants.

MEMORANDUM AND ORDER

Pending is Defendants Joan Raymond, Sylvia Macy, and Barbara Turner's Motion for Summary Judgment (Document No. 44), Defendant Houston Independent School District's Motion for Summary Judgment (Document No. 84), and Plaintiff's Motion for Partial Summary Judgment (Document No. 92). Having carefully considered the arguments, authorities, and summary judgment evidence submitted by counsel, the Court is of the opinion that Defendants Raymond, Macy, and Turner's Motion should be GRANTED in part, that Defendant Houston Independent School District's Motion should be GRANTED, and that Plaintiff's Motion should be DENIED as Moot.

Appendix B

I. *Background*

Plaintiff Rosa Becerra, individually and on behalf of her minor son, Juan Doe, brings this action against Defendants asserting claims under 42 U.S.C. § 1983 and Texas state law. The uncontroverted summary judgment evidence reveals the following:

Defendant Jerry Asher was employed as an elementary school music teacher in the Houston Independent School District ("HISD") from 1975 until December 5, 1992. In 1987, while a music teacher at Frost Elementary School, Asher was charged with the crime of indecency with a child arising out of his alleged inappropriate touching of a young male student at the school. Asher was acquitted of the charge by a jury in January, 1988. After the acquittal, Asher, who had been suspended with pay by then-HISD Superintendent Defendant Joan Raymond, resumed teaching music for HISD, this time at Patterson Elementary School.

During Asher's tenure at Patterson Elementary, the school's principal, Defendant Barbara Turner, heard that Asher planned to give private music lessons in his classroom, that he had questioned students about personal matters, and that he had asked a student to roll up his pant so that Asher could examine his leg for signs of physical abuse. Ms. Turner told Asher not to engage in such activities and had the school nurse examine the boy whose leg Asher had examined. Asher informed Turner that he had a mission from God to help abused children and that if he had not helped the boy whose leg he had examined, the boy would still be "raped orally and anally." Asher also disrupted a faculty meeting and tried to initiate a group prayer in an attempt to quell rumors about the prior indecency charge. Ms. Turner

reprimanded Asher for this behavior and recommended that he receive a medical evaluation. No such evaluation took place. In July, 1990, Defendant Sylvia Macy, an area superintendent with HISD, authorized the transfer of Asher to J.R. Harris Elementary School. Both Macy and Turner informed the principal of Harris Elementary about the "pant leg" incident.

Juan Doe ("Juan") attended Harris Elementary during the 1990-91 and 1991-92 school years, where he attended a twice-a-week music class taught by Asher and another teacher. Asher cultivated a friendship with Juan and his brother Maruo, which continued after Juan withdrew from Harris on March 9, 1992, and was no longer Asher's student. With the permission of Juan's mother, Plaintiff Rosa Becerra, Asher spent considerable time with Juan and Maruo, including home music lessons, church activities, and trips to the zoo, the Astroworld theme park, and the Sea World theme park in San Antonio, Texas. Plaintiff Becerra was sometimes present for such activities and sometimes was not. Asher also provided gifts and financial assistance to the family.

On August 29, 1992, and on September 12, 1992, Asher, with Plaintiff's permission, was alone with Juan and Maruo at Plaintiff's home. Asher was to take the boys to Astroworld and to a dog show on those respective Saturdays. Before leaving on these outings, however, Asher sexually molested Juan. Juan's grandmother witnessed the September 12, 1992, incident and informed Plaintiff. Asher thereafter wrote Plaintiff an incriminating note in which he pleaded with her not to press charges. Plaintiff reported Asher to the authorities and Asher was subsequently charged with indecency with a child in the 228th District Court of Harris County, Texas. Asher was temporarily reassigned to a non-teaching position by then-HISD

Superintendent Frank Petruzielo until he voluntarily resigned his employment on December 5, 1992. Asher pled guilty to the indecency charge and the state court sentenced him to 50 years in state prison, where he currently resides.

Plaintiff's suit charges that Defendants violated Juan's substantive due process right to bodily integrity and that HISD violated Juan's right to the equal protection of the laws by maintaining a policy of transferring "troubled teachers," including Asher, to schools predominantly populated with minority students like Juan, who is Hispanic. Plaintiff also asserts state law negligence and intentional infliction of emotional distress claims against Defendants Joan Raymond, Sylvia Macy, and Barbara Turner ("the individual HISD Defendants"). HISD and the individual HISD Defendants have filed separate motions for summary judgment.[1] Additionally, Plaintiff has moved for partial summary judgment on the issue of whether HISD had a program to train its personnel in recognizing and dealing with sexual abuse of schoolchildren.

II. *Discussion*

A. *The Summary Judgment Standard*

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

1. Defendant Asher, the perpetrator of the despicable criminal conduct against Juan, represents himself in this case and is not a movant in the pending motions of HISD and the individual HISD Defendants.

as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Id.* at 2553-54. A party opposing a properly-supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986). Unsubstantiated or conclusory assertions that a fact issue exists will not suffice. *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993); *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Krim*, 989 F.2d at 1442.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. *Kelley v.*

Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 688 (1994), *citing Matsushita*, 106 S. Ct. at 1351. On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.*, *citing Anderson*, 106 S. Ct. at 2511.

Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson*, 106 S. Ct. at 2513. *Accord, Veillon v. Exploration Services, Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2728 (1983).

B. *The Individual HISD Defendants' Motion*

An individual may bring suit against any person who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia," has deprived that individual of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. The Fifth Circuit has held that sexual abuse of a schoolchild by a teacher acting under color of state law violates the child's Fourteenth Amendment liberty interest in being free from state-occasioned damage to his bodily integrity. *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 450-52 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994). Plaintiff alleges that Defendant Asher violated this right of Juan's and that the individual HISD Defendants' are also liable because, knowing the risk that Asher posed to minor schoolchildren, the individual HISD Defendants, through various acts of misfeasance or nonfeasance, allowed Asher to become Juan's music teacher, thereby demonstrating deliberate indifference to Juan's constitutional rights, which deliberate indifference was the

moving force behind Asher's unlawful actions. The individual HISD Defendants assert, in part, that summary judgment in their favor should be granted as to this claim because Plaintiff cannot establish that the sexual assaults on Juan occurred as a result of state action or under color of state law and, therefore, that Plaintiff has failed to defeat the individual HISD Defendants' defense of qualified immunity.[2]

Under the qualified immunity doctrine, public officials serving in a discretionary capacity are shielded from liability under § 1983 unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). Once a defendant raises the defense of qualified immunity, the burden shifts to the plaintiff to rebut it. *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987).

Initially, a Court is to examine the plaintiff's pleadings to determine if the plaintiff has alleged a constitutional violation at all. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3042-43 n.6 (1987); *Wicks v. Mississippi State Emp. Services*, 41 F.3d 991, 995 (5th Cir.), *cert. denied*, 115 S. Ct. 2555 (1995). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815 (1985). While the HISD Defendants moved to stay all discovery in this case, the Honorable Frances H. Stacy, United States Magistrate Judge, permitted discovery to proceed on the issue of qualified

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2. When a § 1983 action is brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. *Doe v. Rains Independent School Dist.*, 66 F.3d 1402, 1406 (5th Cir. 1995). The terms are used interchangeably throughout this Order.

immunity. (Document No. 56). *See Lion Boulos v. Wilson*, 834 F.2d 504, 510 (5th Cir. 1987) ("The district court properly chose not to rely solely on Boulos's version of the facts, but, instead, to obtain a clearer picture of what occurred at the inspections by the use of limited discovery.").

Plaintiff's Third Amended Complaint does appear to allege state action sufficient to establish a violation of Juan's constitutional rights. Specifically, the Complaint alleges that Asher fondled Juan's genitals through his clothes in a classroom while Juan was one of Asher's students. However, "[e]ven if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue of material fact as to whether the defendant in fact committed those acts." *Mitchell*, 105 S. Ct. at 2815. *See also Johnson v. Jones*, 115 S. Ct. 2151 (1995).

In support of her claim that Asher sexually molested Juan at school and while Juan's teacher, Plaintiff submits the unanswered requests for admission sent to Asher. Although Fed. R. Civ. P. 36(a) provides that matters set forth in a request for admission will be considered admitted if not timely answered, such deemed admissions are binding only on the non-responding party, not on co-parties. *See Riberglass, Inc. v. Techni-Glass Industries, Inc.*, 811 F.2d 565 (11th Cir. 1987); *In re Leonetti*, 28 B.R. 1003, 1009 (E.D. Pa. 1983), *aff'd, Earl Realty, Inc. v. Leonetti*, 725 F.2d 667 (3d Cir. 1983). *See also* 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2264 at 571-72 (1994) ("It is only when the admission is offered against the party who made it that it comes within the exception to the hearsay rule for admissions of a party opponent."), and *id.* at 580 ("Nor do the admissions of a party bind a coparty."). Accordingly, the deemed admissions of Asher, who is in prison

and not represented by counsel, are not competent evidence with regard to the individual HISD Defendants' Motion for Summary Judgment.[3]

Plaintiff also submits the affidavit of Juan's psychiatrist, Dr. Richard B. Pesikoff, for the proposition that the "sexual entanglement" of Juan began during class sessions. The affidavit, however, states that Asher gave special attention to Juan in class, not that Asher molested, abused, or inappropriately touched Juan in class or while Juan was Asher's student. In any event, Pesikoff's statements as to what Juan told him are hearsay.

Accordingly, the only summary judgment evidence of sexual abuse suffered by Juan at the hands of Asher is contained in the transcript of testimony given by Juan, his mother, and by Asher himself, in the sentencing phase of Asher's state criminal trial. None of that testimony described any misconduct by Asher except for his criminal acts against Juan in Juan's home on two days in August and September, 1992, five to six months *after* Juan had transferred to another school and had thereby ceased to be a pupil in the class taught by Asher. The Fifth Circuit has held that a sexual assault on a minor student by a public schoolteacher is conduct under color of state law "if a 'real nexus' exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher." *Doe*, 15 F.3d at 452 n.4. The molestation of Juan in August and

3. Moreover, even if the deemed admissions were admissible against the individual HISD Defendants, Asher does *not* admit that he sexually molested Juan while he was Juan's teacher or that he molested Juan at school. Rather, the admissions broadly state that Asher had various sexual contacts with Juan "some time between 1987 and 1992," and "while a teacher at HISD." The uncontroverted summary judgment evidence is that Asher was a teacher at HISD until December 5, 1992, but that he ceased being Juan's teacher at least as of March 9, 1992, when Juan withdrew from Harris Elementary.

Appendix B

September of 1992 occurred a number of months after Juan was no longer Asher's student or a student at Asher's school. Further, there is no summary judgment evidence that Asher's visits to Plaintiff's home on August 29, 1992, or on September 12, 1992, or on any other date, were made pursuant to his duties as an HISD teacher or at the direction of HISD or any of the individual HISD Defendants. To the contrary, the uncontroverted summary judgment evidence is that Asher visited Plaintiff's home and family on his own volition, with the permission of Juan's mother, and pursuant to the personal relationship that he had developed with the family.

As such, this case is not like *Doe*, where the sexual molestation victim was a student of the charged teacher "before, during, and after their sexual liaison," *id.* at 462 (Higginbotham, J. concurring). Instead, this case is more nearly analogous to *D.T. by M.T. v. Independent School Dist. No. 16*, 894 F.2d 1176 (10th Cir.), *cert. denied*, 111 S. Ct. 213 (1990), where the teacher was alleged to have sexually molested three boys, who had been students of his, while on a summer trip to sell candy to raise money for a basketball camp. *See Doe*, 15 F.3d at 452 n.4 ("[T]he nexus that was missing in *D.T.* was clearly present in this case."). Despite the fact that school district officials were alleged to have had knowledge of prior misconduct with minors by the teacher, the *D.T.* Court held that because the molestations took place during summer vacation while the teacher and the boys were participating in a voluntary, non-school-sponsored activity, the teacher's wrongful acts were not committed under color of state law and the acts were "too remote a consequence" of the school district's policies to hold the district liable under the federal civil rights laws. 894 F.2d at 1189. The acts in question, held the Court, "were the product of a private individual acting in his private capacity in connection with a private activity that the plaintiffs voluntarily and freely participated in as private

individuals." *Id.* at 1186. The uncontroverted summary judgment evidence demonstrates that the same is true in this case.[4] *See also Martinez v. State of California*, 100 S. Ct. 553, 558-59 (1980) (parole board not liable under § 1983 for releasing prisoner who killed plaintiff because "[a]lthough the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action.").

The mere fact that Asher was a teacher employed by HISD at the time of the sexual assaults is insufficient to show state action. The acts of state officers in the ambit of their personal pursuits are not acts under color of state law. *See Screws v. U.S.*, 65 S. Ct. 1031 (1945). *See also Delcambre v. Delcambre*, 635 F.2d 407, 408 (5th Cir. 1981) (assault by on-duty police chief at police station not action under color of state law where assault arose out of personal dispute and chief did not exercise or threaten to exercise authority as police officer).

Plaintiff's Third Amended Complaint also appears to assert a "state-created danger" theory of liability. While this theory has never been recognized by the Fifth Circuit as a valid basis for liability under § 1983, *see Leffall v. Dallas Independent*

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4. Indeed, the links between state action and the molestations at issue are even more tenuous in this case. In *D.T.*, the relevant acts occurred a month or so after the teacher/student relationships had ended by virtue of the summer break. *Id.* at 1178, 1182-84. In this case, the relevant acts occurred five to six months after the teacher/student relationship had ended by virtue of Juan's withdrawal from the school. In *D.T.*, while the basketball camp was not school-sponsored or organized, certain other promotional and fund-raising activities regarding the camp were approved by the school district and conducted on district property, as was the camp itself. *Id.*, at 1182-84. In this case, no showing has been made that HISD or the individual HISD Defendants knew of or approved of activities even remotely related to Asher's non-school activities with Juan.

School Dist., 28 F.3d 521, 530 (5th Cir. 1994), the Fifth Circuit has noted that the "key" to the theory "lies in the state actors' culpable knowledge and conduct in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.' " *Johnson v. Dallas Independent School Dist.*, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995), *quoting Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987). In this case, the individual HISD Defendants did not place Asher in Plaintiff's home in August and September of 1992, nor did they strip Juan or his mother of the ability to defend Juan, or cut off sources of private aid. While Juan may have been defenseless with regard to Asher's reprehensible criminal acts, this was a result of Juan's minority and Asher's exploitation both of Juan and of Juan's mother regarding the child's supervision, and was not the result of any affirmative acts of the individual HISD Defendants.[5]

Accordingly, as Plaintiff has failed to raise so much as a fact issue that Juan suffered a constitutional deprivation under color of state law, the individual HISD Defendants are entitled to qualified immunity and summary judgment as to Plaintiff's federal claims. *See Correa v. Fischer*, 982 F.2d 931, 933, 936 (5th Cir. 1993) ("As we hold that there is no evidence that Fischer's dismissal of the plaintiffs was politically motivated, the district court's grant of Fischer's motion for summary

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5. Moreover, even if the individual HISD Defendants could be held to have violated Juan's constitutional rights under a state-created danger theory of § 1983 liability, the individual HISD Defendants would still be entitled to qualified immunity because they would not have violated Juan's *clearly-established* rights. *See Mitchell*, 105 S. Ct. at 2814. As *Leffall* and *Johnson* make clear, the state-created danger theory is not clearly established in this Circuit or under Supreme Court case law. *See Ebanks v. Stalder*, 1995 WL 769726 at *3-4 (E.D. La. Dec. 27, 1995) (defendants entitled to qualified immunity because state-created danger theory not recognized in Fifth Circuit).

judgment [on the basis of qualified immunity] is affirmed."); *Geter v. Fortenberry*, 849 F.2d 1550, 1554 (5th Cir. 1988) ("Because appellee could not establish a fact issue concerning a violation of his rights, appellants' assertion of immunity from suit should have been honored by the trial court.").

Plaintiff also asserts state law causes of action pendent to her federal law claims against the individual HISD Defendants. Having concluded that the HISD Defendant's Motion for Summary Judgment should be granted as to all claims against said Defendants over which this Court has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. 28 U.S.C. § 1367(c). These matters are more properly dealt with in the state courts of Texas. *See Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

C. *HISD's Motion*

HISD also moves for summary judgment on the ground that Plaintiff cannot demonstrate that Juan suffered a constitutional violation because Asher was not acting under color of state law when he molested Juan. A § 1983 claim against a government entity requires an examination of whether the plaintiff's harm was caused by a constitutional violation and, if so, whether the entity may be held legally responsible. *Collins v. City of Harker Heights, Texas*, 112 S. Ct. 1061, 1066 (1992). Having failed to raise a genuine issue of material fact that Juan suffered a constitutional deprivation under color of state law, as held above, Plaintiff clearly fails the first part of the *Collins* test.

Plaintiff protests, however, that discovery has been limited in this case to issues of qualified immunity — a defense which HISD cannot assert. Accordingly, Plaintiff moved to continue the Court's consideration of HISD's summary judgment motion. The Court previously denied this motion and is not persuaded that the ruling should be reconsidered. If Plaintiff cannot demonstrate that Juan suffered a constitutional violation under color of state law, no amount of *further* discovery into HISD's policies, practices, and alleged knowledge of Asher's behavior with schoolchildren, as requested by Plaintiff's counsel, will suffice to raise a genuine issue of material fact precluding summary judgment.[6]

HISD also moves for summary judgment on Plaintiff's equal protection claim, asserting that Plaintiff has failed to raise a fact question as to whether HISD intentionally discriminated against Juan because of his race by transferring Asher and other "troubled teachers" to predominantly-minority schools. Indeed, Plaintiff has presented no evidence of intentional race discrimination by HISD in its transfer decisions, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S. Ct. 555, 563 (1977) (equal protection violation requires intentional or purposeful discrimination), and Plaintiff did not assert a need for further discovery on the issue in her Motion for Continuance and affidavit. *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993) ("To obtain a continuance of a motion for summary judgment in order to obtain further discovery, a party must indicate to the court by some statement, preferably in writing (but not necessarily in the form

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6. Plaintiff's failure to demonstrate that Juan suffered a constitutional deprivation under color of state law likewise moots Plaintiff's Motion for Partial Summary Judgment regarding whether HISD had a sexual abuse training program for its personnel.

of an affidavit), why he needs additional discovery and how the additional discovery will create a genuine issue of material fact.").

Plaintiff has submitted evidence of the racial makeup by 1991 of the student bodies of the schools to which Asher was transferred over the course of his HISD career. Even if the submitted numbers were sufficient to show that minority students were disparately impacted by HISD's transfer decisions regarding Asher, there is still no summary judgment evidence that HISD transferred Asher with the *intent* to disadvantage minority students. *See Arlington Heights*, 97 S. Ct. at 563 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").[7] In any event, even if Plaintiff could raise a fact issue as to intentional race discrimination by HISD in its teacher transfer decisions, under the authority of *Martinez*, 100 S. Ct. at 559, and *D.T.*, 894 F.2d at 1189, the sexual assaults on Juan five to six months after Juan withdrew from Harris Elementary were "too remote a consequence" of HISD's transfer policies to hold the district liable under § 1983. Accordingly, as a matter of law, HISD is entitled to summary judgment in its favor.[8]

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7. Whether the numbers suggest disparate impact is quite questionable. The uncontroverted summary judgment evidence is that the student population of HISD in 1991 was only 13.6% white. Nonetheless, despite Plaintiff's claim that Asher was known at his first school to be of bad character and to have acted peculiarly with schoolchildren, Asher was transferred in 1980 from the 1% white school to one with an 8% white student body. Asher's next transfer was to a school with less than a 1% white student enrollment, which is where he taught when he was criminally charged in 1987. After Asher's 1987 criminal trial and acquittal for indecency with a child, Asher was then transferred to a school with a 25% white student body.

8. It is not clear whether Plaintiff's Complaint is also directed at (Cont'd)

Appendix B

III. ORDER

For the foregoing reasons, it is

ORDERED that Defendants Joan Raymond, Sylvia Macy, and Barbara Turner's Motion for Summary Judgment (Document No. 44) is GRANTED as to Plaintiff's claims against Defendants Raymond, Macy, and Turner under 42 U.S.C. § 1983. These claims are DISMISSED on the merits. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims of negligence and intentional infliction of emotional distress against Defendants Raymond, Macy, and Turner. Accordingly, the state law claims are DISMISSED without prejudice to Plaintiff's refiling the claims in the appropriate state court. Plaintiff should take note that the period of limitations for the dismissed state claims is tolled for an additional period of thirty (30) days after the date of this Order of Dismissal unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d). It is

FURTHER ORDERED that Defendant Houston Independent School District's Motion for Summary Judgment (Document No. 84) is GRANTED. Plaintiff's claims against Defendant Houston Independent School District are DISMISSED on the merits. Plaintiff's Motion for Partial Summary Judgment (Document No. 92) is DENIED as Moot.

(Cont'd)

Defendants Raymond, Macy, and Turner in their official capacities. If it is, however, then summary judgment in favor of these Defendants in their official capacities is warranted as well. *See Kentucky v. Graham*, 105 S. Ct. 3099, 3105 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

Appendix B

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 13TH day of Feb., 1996.

s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED APRIL 7, 1997

Rosa BECERRA, Individually and as next friend of Juan Doe, A Minor, Plaintiff-Appellant,

v.

Jerry ASHER, et al., Defendants,

Houston Independent School District, Joan Raymond, Sylvia Macy and Barbara Turner, Defendants-Appellees.

No. 96-20401.

United States Court of Appeals, Fifth Circuit.

April 7, 1997.

* * *

Before POLITZ, Chief Judge, and REAVLEY and DENNIS, Circuit Judges.

PER CURIAM:

The two paragraphs at the end of Part A in the original opinion, 105 F.3d at 1048, should not be read to preclude a determination that, given a real nexus, school supervisors who are deliberately indifferent to a student's constitutional liberty interest in her bodily integrity are themselves the state actors

who perpetrated the constitutional tort, regardless of whether the individual who actually made illicit physical contact with the student was acting under color of state law.

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court by polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 27, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20401

ROSA BECERRA, Individually as next friend of Juan Doe A Minor

Plaintiff - Appellant

v.

JERRY ASHER, et al

Defendants

HOUSTON INDEPENDENT SCHOOL DISTRICT; JOAN RAYMOND; SYLVIA MACY, Assistant Superintendent/ Houston Independent School District; BARBARA TURNER, Principal/Houston Independent School District

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 2/14/97, 5 Cir., __, __ F.3d __)

Before POLITZ, Chief Judge, REAVLEY and DENNIS, Circuit Judges.

Appendix D

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also denied.

* * *

ENTERED FOR THE COURT:

s/ Thomas M. Reavley
United States Circuit Judge

[stamp]
CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 96-2052

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ROSE BECERRA, individually and as next friend of
JUAN DOE, a minor

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, JOAN
RAYMOND, SYLVIA MACY and BARBARA TURNER

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petitioner's son was molested by one of his former teachers. The molestation occurred five months after the student stopped attending the teacher's school. The Petitioner asserts a violation of substantive due process pursuant to 42 U.S.C. § 1983.

Did the Fifth Circuit properly affirm summary judgment where there was no evidence that the molestation occurred "under color of state law" as required by 42 U.S.C. § 1983 and where there was no other evidence that any abusive conduct occurred during the time that the student was enrolled at the teacher's school?

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2. The Fifth Circuit's disposition of Petitioner's substantive due process

claim does not conflict with any circuit court decision. 14

3. Becerra's argument that schools have a special constitutional duty to protect school children has been rejected by every circuit court to consider the issue. 19

C. Granting the Petition would be futile because, even if Juan Doe could show a constitutional violation under color of state law, the Respondents would still be entitled to summary judgment. 20

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No. 96-2052

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ROSE BECERRA, individually and as next friend of JUAN DOE, a minor

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, JOAN RAYMOND, SYLVIA MACY and BARBARA TURNER

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Houston Independent School District, Joan Raymond, Sylvia Macy, and Barbara Turner respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's decision in this case. The decision of the Fifth Circuit is reported at 105 F.3d 1042 (5th Cir. 1997). The opinion of the Fifth Circuit denying Petitioners' petition for rehearing and rehearing *en banc* also is reported at 105 F.3d 1042 (5th Cir. 1997).

SUMMARY

The Petition should be denied. First, because of evidentiary rulings made below, the Court need not ever reach Petitioner's Questions Presented. The Petitioner's argument is based on untimely evidence properly excluded by the courts below. To consider the Petitioner's argument, the Court first would have to determine whether the district court abused its discretion in excluding the evidence--an issue not even briefed by the Petitioner.

Second, contrary to the Petition, the decision below does not conflict with any other circuit court decision.

Third, granting the Petition would be futile. Even if the Petitioner could show that her son was molested by a teacher under color of state law, it is well settled that the school district and the teacher's supervisors may be not held vicariously liable for the molestation under 42 U.S.C. § 1983.

Although the facts of this case are tragic, this case involves the routine application of Rule 56 of the Federal Rules of Civil Procedure and well-settled rules of law to a particular set of facts. In the end, the Petitioner is merely asking the Court to provide yet another level of appellate review to the district court's determination that she failed to raise a genuine issue of material fact on an essential element of her claim.

STATEMENT OF THE CASE

Proceedings Below

The Petitioners, Rose Ruiz Becerra, individually and as next friend of Juan Doe, a minor ("Becerra"), filed suit against

the Houston Independent School District ("HISD"); three current or former HISD administrators, Joan Raymond, Barbara Turner, and Sylvia Macy (collectively the "Respondents"); and Jerry Asher, a former HISD teacher ("Asher"), on December 14, 1994, alleging violations of federal and state law. (10 R. 1-12). Raymond, Macy, and Turner moved for summary judgment on July 14, 1995. (R. 773, 803). On November 17, 1995, HISD moved for summary judgment. (R. 773, 803, 2836, 2039).[1] The Petitioner did not submit an affidavit from Juan Doe in response to either motion.

On February 14, 1996, the district court granted summary judgment in favor of HISD, Raymond, Macy, and Turner. (R. 2302-2320; 2992-2993). Becerra filed a motion for new trial on February 23, 1996, and submitted for the first time an affidavit from Juan Doe as well as an amended affidavit from her expert.[2] The motion for new trial was denied. (1 R. 2991). The district court issued a final judgment, severing this suit from the claims remaining against Jerry Asher. The district court's decision is reported at 921 F. Supp. 1538 (S.D. Tex. 1996).

Becerra appealed and, after oral argument, the Fifth Circuit affirmed the district court's judgment. Becerra filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied on March 27, 1997. An order denying the rehearing and rehearing *en banc* was issued April

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[1]Asher was not represented by counsel and never filed a motion for summary judgment.

[2]The Fifth Circuit's opinion incorrectly states that the affidavits were filed on February 13th rather than February 23rd. 105 F.3d at 1047 n.20.

7, 1997 and published with the original opinion at 105 F.3d 1042.

Becerra asserts in her Petition that the case against Jerry Asher proceeded to trial. (Pet. at 8.) The proceedings at that trial, including the testimony and the outcome, are not reflected in the record of this case. Indeed, the trial against Jerry Asher occurred after the Fifth Circuit heard oral argument in this case. Accordingly, Becerra's representations about Juan's alleged testimony at that trial are irrelevant to the question of whether summary judgment was mandated in this case.

Statement of Facts

The Petition contains numerous factual distortions and misrepresentations of the evidence. Becerra fails to disclose that some of her "facts" were not submitted until *after* summary judgment had been granted. The district court declined to allow Becerra's late evidence, and the Fifth Circuit held that the district court did not abuse its discretion in denying the request to consider additional evidence. 105 F.3d at 1047 n.20.

Because the Respondents disagree with Becerra's statement of facts, the Respondents provide their own:

The Houston Independent School District is the nation's fourth largest school district. It employs approximately 25,000 people in 225 schools and maintains a student population of approximately 194,000. (2 R. 2823.) Jerry Asher was employed as an elementary school music teacher from 1975 to 1992. His evaluations were consistently excellent, and he was known for putting on excellent music programs for children. (5 R. 1650; 2 R. 2700 p. 74; 2 R. 2694, 2596-2589; 5 R. 1697-1689.) In 1987, while teaching at HISD's Frost Elementary School, Asher was charged with indecency with a child. (2 R. 2823.) Dr. Joan Raymond, superintendent of schools, immediately suspended Asher. (2 R. 2824-2823; 8 R. 761-63.)

Asher's personnel file contains no documents reflecting any improper contact with students prior to the 1987 allegation. (3 R. 2322.)

Subsequently, a trial was held, and a jury acquitted Asher of all charges. (3 R. 2588; 2 R. 2823.) The jury did not believe the child. (3 R. 2588.) Notwithstanding the acquittal, Becerra asserts that it is "undisputed" that the child's allegation was true. (Pet. at 5.) Becerra also asserts that HISD had knowledge of unspecified admissions by Asher, but the record shows that the Respondents did not know about any alleged admissions of criminal wrongdoing by Asher. (2 R. 2798-2797; 3 R. 2566; 2 R. 2785-2786; 2 R. 2679 p. 29.)

Asher held a "continuing contract" under Texas law, which is a type of tenure.[3] (R. 1696.) The grounds for termination are specifically limited by statute. Following his acquittal, Asher met with HISD's associate superintendent for personnel, who urged him to resign. (8 R. 598-600; 3 R. 2566.) She told Asher that, although he had been acquitted, the fact that charges had been filed against him would affect the way people looked at him. Asher insisted on returning to work. The associate superintendent warned Asher to avoid any appearance of improper conduct. (8 R. 598; 3 R. 2566.) The personnel department transferred Asher to Patterson Elementary School where there was a vacancy.

When Asher was assigned to Patterson School, the Respondent Barbara Turner was the campus principal. Mrs. Turner's supervisor was the Respondent Sylvia Macy, an area superintendent. When Mrs. Turner found out that Asher had been tried for indecency, she called Mrs. Macy to find out if she had to keep him. (2 R. 2679 at 29.) Mrs. Macy called her

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[3] *See Findeisen v. Northeast Indep. Sch. Dist.*, 749 F.2d 234 (5th Cir. 1984).

own supervisor and confirmed that Asher had been charged and acquitted and was entitled to continue employment. (8 R. 754-756, 631-634; 2 R. 2679 at 29-30.) Mrs. Turner and her staff began scrutinizing Asher's interaction with students. (8 R. 744, 737-739.) Mrs. Turner prohibited Asher from giving private music lessons. (8 R. 744-745, 740-741, 738-739.)

Although no parent, teacher, or student ever complained to Mrs. Turner that Asher was improperly touching children (8 R. 735, 738), Mrs. Turner "didn't want to take any chances." (6 R. 1409.) When Asher allegedly counseled some students about personal matters, Mrs. Turner ordered him not to do this. (8 R. 695-696, 707; 2 R. 2731.) Asher allegedly looked at bruises on the leg of a student because Asher allegedly believed that the student had been abused by a relative. (8 R. 733-734, 740.) Mrs. Turner immediately asked the school nurse to conduct an investigation and talk to the student. (8 R. 734, 721-723; 2 R. 2770 at 57-58.) Mrs. Turner reprimanded Asher and ordered him to refer any students with problems or child abuse concerns to the principal, counselor, or school nurse. (8 R. 695-696.) She told him that, based on his prior problems at Frost Elementary, he could not afford even the appearance of impropriety.

In April 1990, Asher spoke at a faculty meeting about his previous acquittal to stop rumors, and he attempted to engage the faculty in a group prayer. Mrs. Turner reprimanded Asher in writing. (2 R. 2731.) The incident prompted Mrs. Turner to write a memorandum requesting a medical evaluation of Asher, but the recommendation was never processed. (8 R. 706, 734-735, 623-624.) In May 1990, although no complaints about touching had ever been received, Mrs. Macy, the area superintendent, met with Asher and issued him a global reprimand ordering him "not to question students about their private life, examine children, or be involved in any

activity that would resemble such action." (8 R. 625-626, 606-607; 2 R. 2643.) Asher was warned that a violation of the directive would result in his termination. (2 R. 2643.)

As a result of these events, the relationship between Mrs. Turner and Asher had become strained, and she requested a transfer for Asher. (8 R. 745-747, 730-732.) Mrs. Macy believed that the threat of termination would have a positive effect on Asher. (8 R. 623-624.) In July 1990, Asher was transferred to Harris Elementary School. The principal of Harris Elementary was George Smith, who had been there nearly 30 years and had a reputation for being strict. (8 R. 687, 676, 665-666.) Mrs. Macy told Mr. Smith about the incidents at Patterson Elementary. (8 R. 665-666, 621-622.) Mr. Smith told Asher that, if Mr. Smith heard any allegations about improper conduct, he would "kick his ass." (8 R. 676-677.) Mr. Smith warned Asher that even innocent touching could be misconstrued. Mr. Smith assigned Asher to a large classroom with another teacher in a concept known as "team teaching." During Asher's two years at Harris, Mr. Smith never received any complaints about Asher. (8 R. 686 pp. 12-13.)

Becerra's son, Juan Doe, attended Harris Elementary during the 1990-91 school year and the fall semester of the 1991-92 school year. According to Juan, he took music classes twice a week for one year that were taught by Asher. (R. 538, 532, 2499.) In the spring of 1992, Juan Doe began at Harris Elementary, transferred to a different school in early February, transferred back to Harris at the end of February, but permanently transferred away from Harris Elementary on March 9, 1992. (3 R. 2604-2601.)

Juan and his mother had developed a personal friendship with Asher that continued after Juan withdrew from Harris Elementary. Juan later testified at Asher's sentencing hearing that he called Asher nearly every Saturday to go places.

(3 R. 2491; 8 R. 524.) Asher took him and his brother to the zoo, Astroworld, and Sea World in San Antonio. (8 R. 535-586.) Asher gave music lessons in Becerra's home. (8 R. 573.) They participated in church activities together. (8 R. 568.) Becerra testified that she herself invited Asher's attention to make her boys happy and that she sometimes asked Asher for financial help. (8 R. 542, 545.) *It is undisputed that Becerra even gave Asher permission to sleep in the same bed as Juan and Juan's brother.* (8 R. 526-527, 523, 547.) Juan testified that Asher was "fun" and he hoped Asher would marry his mother. (3 R. 2499; 8 R. 522, 532.) Becerra even met Asher's parents. (3 R. 2512; 8 R. 546.) The district court concluded, and the Fifth Circuit agreed, that it is undisputed that HISD's officials did not know that this private relationship had developed. 105 F.3d at 1047; 921 F.Supp. at 1545 n.4.

The Petition asserts that Asher "awarded Juan marks" but did not require him to complete assignments. (Pet. at 4.) There is no competent summary judgment evidence to support this allegation, and it is not contained in either Juan's affidavit or in his expert's affidavit.

On August 29 and September 12, 1992, Asher molested Juan at Juan's own home. (8 R. 560; 6 R. 1429; 3 R. 2498; 6 R. 1201, 1197.) Asher was in the home with Becerra's permission. Asher was immediately reassigned away from the classroom. (3 R. 2600.) He submitted his resignation to the District on December 5, 1992. (3 R. 2599.) He later pled guilty to child molestation, and in January 1993, a sentencing hearing was held. Asher admitted the two acts of molestation that occurred at Juan's house. (6 R. 1224-1189.) Asher did not admit any acts against any other children. Asher was sentenced to 50 years in state prison. (6 R. 1429.)

The Petition represents that Asher had a "long, sordid" history of abusing students in HISD. No evidence in the record

supports Petitioner's assertions. There is no testimony from any other student in the record, and Asher has never admitted molesting any person except Juan Doe. Petitioner bases her assertion on Asher's *non-responses* to Becerra's requests for admissions. Asher, who is in prison, never responded to Becerra's requests for admission. Consistent with other circuits, the Fifth Circuit correctly determined that "deemed" admissions of one party cannot be used against a co-party. *Becerra*, 105 F.3d at 1048; *Riberglass Inc. v. Techni-Glass Industries Inc.*, 811 F.2d 565, 567-67 (11th Cir. 1987). Further, looking at the actual content of the requested admissions, both the district court and the Fifth Circuit determined that the deemed admissions did not establish that Asher molested Juan while he was Juan's teacher or on HISD property. 921 F. Supp. at 1544; 105 F.3d at 1048.

In her response to the motions for summary judgment, Becerra also introduced Asher's testimony from his 1993 sentencing hearing. This hearing occurred after Juan had been molested and after Asher had resigned from HISD. Asher testified at his sentencing hearing, but the only specific wrongful acts he admitted were the August and September 1992 molestations of Juan Doe. The transcript does not prove that Asher committed other wrongful acts or that the Respondents knew about any other alleged wrongful acts.

Although Becerra did not submit a summary judgment affidavit from Juan Doe, she did submit one from her expert, a doctor. The expert vaguely testified that the "enticement" of Juan began during class through "special attention and benefits." (4 R. 2187.) The affidavit contained no allegations of molestation, abuse, or fondling. Ten days after summary judgment was granted, Juan submitted an affidavit that contained vague allegations of teacher favoritism and invasions of personal space, but no specific allegations of fondling or

physical contact that was remotely sexual or abusive. (1 R. 2881.) Becerra also submitted an additional affidavit from her expert. It, too, talked about invasions of personal space, but its only specific allegation was that Asher had touched Juan's shoulder. As noted by the district court and the court of appeals, none of the affidavits supported the specific allegations of on-campus genital touching that are found in Becerra's Third Amended Complaint (the last live pleading).

The district court refused to consider the late affidavits, determining that the information in the affidavits had been uniquely available to Becerra all along. 921 F.Supp. at 1548. The Fifth Circuit concluded that the district court did not abuse its discretion in denying the request to hear late evidence. 105 F.3d at 1047 n.20.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Because of evidentiary rulings made by the courts below, the Court need never reach Petitioner's Questions Presented.

Becerra's "seduction" argument is based on allegations contained in untimely affidavits that Becerra submitted after summary judgment. The excluded affidavits contain the only specific details of Asher's alleged classroom conduct. The district court declined to consider the late affidavits, and the court of appeals held that the district court did not abuse its discretion in excluding the affidavits. 105 F.3d at 1047 n.20; *cf. Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-95, 110 S.Ct. 3177, 3191-92 (1990) ("The Court of Appeals' reliance upon the supplemental affidavits was wrong for a second reason: the District Court did not abuse its discretion in declining to admit them.") The excluded affidavits provide the

foundation of Petitioner's Questions Presented. Because Becerra's Petition does not complain about the lower courts' exclusion of the affidavits, and because the exclusion of the affidavits in fact was not an abuse of discretion, the Court need not even reach Petitioner's Questions Presented.

In the absence of the excluded affidavits, there is no specific evidence of Jerry Asher's classroom conduct. The only evidence offered by Becerra in responding to HISD's motion for summary judgment was an affidavit from Becerra's expert vaguely stating that Asher showed Juan "special attention and benefits" while at school.[4] (4 R. 2187.) Summary judgment affidavits must contain specific facts,[5] and those facts must be "significantly probative."[6] The district court determined that the expert's conclusory assertions were insufficient as a matter of law to create a genuine issue of material fact that an unconstitutional act occurred under color of state law. 921 F.Supp. at 1544.

The Respondents note further that Becerra's "seduction and psychological manipulation" argument did not emerge as a distinct theory until after summary judgment. The phrase

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[4]No such affidavit was submitted in response to the motion for summary judgment filed by the individual school officials. (6 R. 1454.)

[5]*Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188-89 (1990) (party moving for summary judgment has a right "to demand at least one sworn averment" of the material facts "before the lengthy process of litigation continues"). Although courts "must be sensitive to the difficulties attendant" in child abuse cases, they cannot "alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States v. Tome*, 115 S.Ct. 696, 705 (1995).

[6]*Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986).

"psychological manipulation" does not appear in Becerra's Third Amended Complaint. Although the word "seduction" appears in the complaint, it is used only in conjunction with Becerra's discussion of alleged physical assaults. In response to the school officials' motion for summary judgment, Becerra claimed that a due process violation occurred "under color of state law *because some of the sexual molestations and assault of the minor Doe occurred while Asher was a teacher at HISD.*" (6 R. 1440, emphasis added). When Becerra filed her motion for new trial, she began urging that a student's rights may be violated by "seduction" in and of itself, without a showing of physical contact. (1 R. 2924.) The seduction theory thus is not properly before this Court.

B. The decision below does not conflict with any decision of this Court or of any circuit court.

The Fifth Circuit held that Asher did not act under color of state law when he molested Juan Doe in August and September 1992 while visiting Juan's house. The court concluded that there was "no real nexus" between "the activity out of which the violation occurr[ed] and the teacher's duties and obligations as a teacher." *Id.* at 1047 (quotation omitted). State action is an essential element of liability under 42 U.S.C. § 1983. *See West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55 (1988). A person acts "under color of state law" when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). The Fifth Circuit's disposition of the "under color of law" issue and substantive due process issue is consistent with the decisions from this Court and other circuit courts.

1. The question of whether Asher was acting under color of state law turns upon the unique facts of this case.

Numerous courts have held that a tortious act is not committed under color of state law merely because the tortfeasor happens to be an employee of a governmental entity. *See, e.g., Jojola v. Chavez*, 55 F.3d 488, 493 (10th Cir. 1995) (school custodian did not act under color of law when he raped student on campus); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1150 (3d Cir.), *cert. denied*, 116 S.Ct. 165 (1995) (firefighter who deliberately started fire did not commit arson under color of state law); *Pitchell v. Callan*, 13 F.3d 545, 548 (2nd Cir. 1994) (off-duty officer did not act under color of law when he shot someone with his own gun that contained police department bullets; plaintiff's subjective perception of officer's authority was irrelevant); *Barna v. City of Perth Amboy*, 42 F.3d 809 (3rd Cir. 1994) (assault with city-issued night stick by off-duty police officers arising out of personal dispute not under color of law). Teachers, like other public employees, have off-duty lives over which their employers have no control.

The Fifth Circuit's decision is virtually identical to *D.T. v. Indep. School Dist. No. 16*, 894 F.2d 1176 (10th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990). In *D.T.*, a teacher who had been convicted of sodomy moved out of state to a new school district. School officials at the new school district heard vague rumors about the teacher, but no complaints were filed. *Id.* at 1177. During the summer, the teacher and three of his fifth-grade students sold candy to earn money for a summer basketball camp. The boys were molested by the teacher. In rejecting school district liability under Section 1983, the court characterized the teacher's acts as "off-duty, private" action. "We reject plaintiffs' contention that the deprivations in this

case are fairly attributable to state law because of the 'cloak of authority' held by a teacher." *Id.* at 1188.

In this case, Asher's contacts with Juan Doe occurred five months after Juan Doe left Asher's school. "Asher's contacts thereafter were in no way part of his duties as a state employee, were not school-sponsored, and were not reported to any school official." *Becerra*, 105 F.3d at 1047. Becerra would have this Court examine the application of the specific facts of this case to well-settled law, in derogation of the Court's oft-repeated admonishment that it is not a "court for correction of errors in fact finding." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538 (1949).

Becerra asserts that the decision below failed to address the "failure to supervise" aspect of her claim. (Pet. at 14.) The question of whether an entity or supervisor may be held liable is separate from the question of whether a constitutional violation occurred in the first instance. *Collins v. Harker Heights, Tex.*, 503 U.S. 115, 122, 112 S.Ct. 1061, 1067 (1992); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 122 n.10, 109 S.Ct. 998, 1007 n.10 (1988). Asher's misconduct did not occur under color of state law and, thus, "without an underlying *constitutional* violation, there can be no § 1983 liability imposed...." *Becerra*, 105 F.3d at 1048 (italics in original). Becerra suggests that this analysis conflicts with other circuits. In the two supervisory liability cases cited by Becerra, however, the courts presumed that the perpetrator acted under color of state law. *See Andrews v. Fowler*, 98 F.3d 1069, 1073 (8th Cir. 1996) (police officer raped girl following police call to girl's home; officer threatened girl with criminal charges); *Wellington v. Daniels*, 717 F.2d 932, 935 (4th Cir. 1983) (assuming that police officer was a state actor when he

beat man with a flashlight). The decision below does not conflict with the cases cited by Becerra.

2. The Fifth Circuit's disposition of Petitioner's substantive due process claim does not conflict with any circuit court decision.

Becerra asserts that Juan would not have been sexually abused by Asher if Asher had not befriended Juan Doe while at school. The Fifth Circuit held that the Constitution is not violated by "the development of trust and affection" between a teacher and a student. 105 F.3d at 1047. No circuit court has held to the contrary.

The lower courts have held that the Due Process Clause is not violated merely because a teacher has engaged in inappropriate or otherwise offensive conduct. *See, e.g., Lillard v. Shelby County Board of Educ.*, 76 F.3d 716 (6th Cir. 1996) (upholding dismissal of claim of one girl who had been "verbally abused" and slapped by male teacher and the claim of a second girl who alleged that the teacher stared at her, made "kissing" noises, questioned her about relationships, and rubbed her stomach while making a suggestive comment); *Jane Doe "A" v. Special School Dist.*, 901 F.2d 642, 646-47 (8th Cir. 1990) (rejecting claim based on allegations that school bus driver touched or kissed students; in examining those acts, the court held it immaterial that "subsequent events proved him to be a sexual reprobate"); *see also Boldthen v. Indep. Sch. Dist.*, 865 F.Supp. 1330, 1337 (D. Minn. 1994) (rejecting a liberty interest claim premised on the allegation that school officials harassed and stared at the plaintiff and patted her on the back and hand); *Floyd v. Waiters*, 831 F.Supp. 867, 875 (W.D. Ga. 1993) (sexually suggestive comments to students do not violate the Constitution).

These decisions are consistent with this Court's previous admonishments that the Constitution does not provide a remedy for ordinary tortious conduct. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665 (1986) ("we must never forget that it is a *constitution* we are expounding") (citation omitted); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126, 112 S.Ct. 1061, 1068 (1992).

Becerra suggests that the Tenth Circuit has recognized that substantive due process protects the right to be free from psychological abuse, citing *Abeyta v. Chama Valley Indep. Sch. Dist., No. 19*, 77 F.3d 1253 (10th Cir. 1996). Becerra distorts the actual holding of that case, which is completely in line with the *Becerra* decision. In *Abeyta*, a teacher called a twelve-year old student a "prostitute" during class and continued to call her this name for a month and a half. In *rejecting* the student's due process claim, the Tenth Circuit stated: "We have found no case in a school context that held conduct falling shy of sexual molestation or assault constitutes actionable sexual harassment." *Id.* at 1255-56. *Abeyta* also is factually distinguishable from *Becerra*. The student in *Abeyta* alleged objectively cruel mistreatment, as opposed to Juan Doe, who alleged that Asher was friendly and invaded his "personal space."[7]

The age of the students was not a relevant factor in any of these cases. Although juveniles may not have the maturity of adults, this limitation does not emanate from any *state-created* restraint and, thus, due process concerns are not

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[7]Becerra also claims that Asher fondled Juan's genitals during after-school private music lessons. Both the district court and the Fifth Circuit noted that *no* evidence supported this allegation. 921 F. Supp. at 1548 n.1; 105 F.3d at 1047 n.20. Even Juan Doe's untimely affidavit did not contain any allegations of sexual contact. 921 F.Supp. at 1549.

implicated. *See Black v. Indiana Area School Dist.*, 985 F.2d 707, 714 (3rd Cir. 1991); *Robertson v. City of Plano,* 70 F.3d 21, 25 (5th Cir. 1995); *see also Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (student's mental retardation not a relevant in abuse case; state did not create the child's disability).

Becerra suggests that the decision below conflicts with *New York v. Ferber*, 458 U.S. 759, 102 S.Ct. 3348 (1982) and *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 102 S.Ct. 2613 (1982). Neither case is legally or factually relevant to Juan Doe's situation. *Ferber* and *Globe* involved First Amendment challenges to statutes designed to protect minors from child pornography (*Ferber*) and from invasion of privacy during sexual abuse trials (*Globe Newspaper*). The question in those cases was whether, consistent with the First Amendment, the state *may* adopt statutes designed to protect minors. Here, the inquiry is whether the Fourteenth Amendment *mandates* protection.

The decision below also does not conflict with the Seventh Circuit's decision in *K.H. by and through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), a case that Becerra never cited in the district court or court of appeals. In *K.H.*, the state removed a child from the custody of her parents and placed her in a series of foster homes where she allegedly was subjected to repeated rounds of alleged sexual abuse from foster parents that the state allegedly suspected to be child abusers. In reviewing the defendants' motion to dismiss under Rule 12(b)(6), the court of appeals determined that the child had stated a due process claim. The opinion makes it clear that the foundation of the child's claim was the state's removal of her from her own home. "[H]aving removed her from [her parents] custody the state assumed at least a limited responsibility for her safety." *Id.* at 849. *K.H.* does not stand

for the broad proposition that the Due Process Clause generally protects "a person's mental health." The limited scope of *K.H.* is underscored by a subsequent decision of the Seventh Circuit. *See Camp v. Gregory*, 67 F.3d 1286, 1292-93 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2498 (1996) ("We believe the fact that the [the state] had been made Anthony's guardian represents a key point of distinction from *DeShaney*"). There is no conflict between and *K.H.* and *Becerra.*

Becerra also does not conflict with an earlier Seventh Circuit case cited by Petitioner, *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), a pre-*DeShaney* case in which police officers arrested a driver and abandoned his three young passengers along the highway on a cold night in a "health endangering" situation. The key to the theory in that case is the state actors' culpable knowledge "in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.'" *Becerra*, 921 F.Supp. at 1545. The danger must be immediate. *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1361 (1995). The requirement of immediate danger means that the harm has a limited range and duration. *See Graham v. Indep. Sch. Dist.*, 22 F.3d 991, 995 (10th Cir. 1994); *cf. Martinez v. California*, 444 U.S. 277 (1980) (holding that parole board was not liable for murder of girl by parolee and observing that board was not aware that the girl, as distinguished from the public at large, faced any danger). The district court found that Juan's private sources of aid were never cut off. 921 F.Supp. 1545.

Becerra claims that the Fifth Circuit's decision conflicts with the Fifth Circuit's decision in *Doe v. Taylor Independent School District,* 15 F.3d 443 (5th Cir. 1994). Becerra's argument does not justify review by this Court. It is the duty

of the Fifth Circuit to maintain uniformity of the decisions from that circuit. Becerra sought--and was denied--*en banc* review of the panel decision below. Further, there is no conflict between *Becerra* and *Taylor*. *See Becerra*, 105 F.3d at 1047.

In the end, Becerra urges the Court to grant certiorari--not because there is a substantial conflict among the circuits--but because the courts below agree that the Due Process Clause is not violated by tortious or offensive conduct. Becerra then proceeds to ask the Court to recognize a new constitutional right, stating that "the law must keep up with the real world." (Pet. at 10.) Becerra argues that an affirmative constitutional duty to protect arises "when the child is rendered susceptible and vulnerable by state action to sexual manipulation by a school teacher." (Pet. at 11.) The parameters of this supposed right are vague and problematic. For example, as the district court noted, "any of innumerable examples of acceptable physical contact" may occur within the context of a teacher/student relationship. 921 F.Supp. at 1449. Is "special attention" by itself actionable as a violation of substantive due process? Under Becerra's proposal, the scores of teacher who legitimately mentor their students or show particular kindness to students would constantly be suspect, and school administrators would have to learn psychiatry and police tactics to supervise them.

Because the decision below conflicts with no decision of this Court or of any other circuit, the Petition should be denied.

3. Becerra's argument that schools have a special constitutional duty to protect school children has been rejected by every circuit court to consider the issue.

Becerra argues that the "greater custodial responsibility" of schools over elementary age children justifies "a heightened level of protection from in-school sexual seduction." (Pet. at 10.) The Fifth Circuit, along with every other court of appeals to consider the issue, has rejected the argument that there is a constitutionally mandated "special relationship" between students and their schools. *See Jojola v. Chavez*, 55 F.3d 488, 491 n.2 (10th Cir. 1995); *D.R. by L.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1368-73 (3d Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1045 (1993); *Doe v. Claiborne Cnty., Tenn.*, 103 F.3d 495, 510 (6th Cir. 1996); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992), *cert. denied*, 507 U.S. 914, 113 S.Ct. 1266 (1993); *see also DeShaney v. Winnebago Cnty. Dept. of Social Services*, 489 U.S. 189, 201, 109 S.Ct. 998, 1006 (1989) (rejecting the claim that a "special relationship" had been created between a child and the state; the fact that the state had once assumed custody of the boy did not make the State "the permanent guarantor of an individual's safety by having once offered him shelter.")

Becerra has failed to show a conflict meriting review by the Court.

C. **Granting the Petition would be futile because, even if Juan Doe could show a constitutional violation under color of state law, the Respondents would still be entitled to summary judgment.**

Assuming *arguendo* that the Petitioner's theory had merit, the Court should not grant certiorari because doing so would be futile. Even if the Fifth Circuit applied an erroneous standard, the ultimate disposition of the motions for summary judgment would be the same: they would be granted, and Petitioner's claim would be dismissed.

First, as previously noted, Becerra's affidavits were excluded from consideration because they were untimely. Thus, even if the "seduction" theory is viable, Becerra offered no evidence to support it.

Second, the individual school administrators asserted the defense of qualified immunity, which provides that public officials serving in a discretionary capacity may not be held liable so long as their conduct does not violate law that was "clearly established" at the time in question. *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 2814 (1985). Becerra's "seduction" theory was not clearly established in 1990 when Jerry Asher was transferred to Juan Doe's school (indeed, the theory is not "clearly established" in 1997). Becerra conceded in her brief to the Fifth Circuit that her theory is merely a proposal and not "clearly established" law. (Appellant's Brief at iv-v.)

Even if the "seduction" theory were clearly established, the individual school administrators would be immune on the additional ground that none of them were "deliberately indifferent" to allegations of sexual abuse. The circuits that have addressed this subject have required evidence of "deliberate indifference" to plain signs of sexual abuse before

a school official will forfeit his or her qualified immunity. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (school administrator may lose immunity if he is deliberately indifferent to facts indicating that the student is being sexually abused); *Jane Doe "A,"* 901 F.2d at 646-47 (supervisors not deliberately indifferent in light of facts known to them at time, even where subsequent events shows bus driver to be a "sexual reprobate"); *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 712-13. (3rd Cir. 1993) (supervisor's failure to conduct a more thorough investigation into allegations of sexual abuse by bus driver did not cause later molestation and did not indicate deliberate indifference); *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (no deliberate indifference shown despite numerous allegations of lesbian relationship between teacher and high school girl); *Stoneking v. Bradford Area Sch. Dist.*, 892 F.2d 720, 731 (3rd Cir. 1989) ("inaction and insensitivity" by superintendent not enough to rise to level of deliberate indifference). Deliberate indifference means more than a "negligent failure to recognize [a] high risk of harm," *Black*, 985 F.2d at 712-13, and it cannot be judged based on hindsight, *Jane Doe "A,"* 901 F.2d at 646-47.

The administrators sued by Becerra--Dr. Raymond, Mrs. Macy, and Mrs. Turner--knew nothing about any non-school relationship between Asher and Juan Doe. *See Becerra*, 921 F. Supp. at 1545. Indeed, Dr. Raymond had left HISD and moved to Illinois over a year and a half before Asher molested Juan. The other administrators, Mrs. Turner and Mrs. Macy, never received specific allegations of touching or abusive acts by Asher against Juan Doe or any other student, but they nonetheless took specific action with respect to the few allegations that were raised and, thus, they were not "deliberately indifferent." They scrutinized Asher's conduct, banned private music lessons, reprimanded Asher in writing,

and threatened him with termination. At his new school, Asher was placed in a "team teacher" situation and thus was seldom alone with students, and no other concerns about inappropriate behavior were ever reported to Mrs. Macy during the two years Asher worked at Juan's school. (R. 2679, p. 56.) Their alleged inaction or insensitivity does not constitute "deliberate indifference." *See Stoneking*, 892 F.2d at 731.

Granting certiorari also would be futile with respect to the claims against the school district. A local government may only be held liable under Section 1983 only if the constitutional injury was caused by the execution of an official policy, custom, or practice by government officials who have final policy-making authority. *Monell v. Dep't of Social Services,* 436 U.S. 615, 98 S.Ct. 2018 (1978). The plaintiff also must establish that the policymaker acted with deliberate indifference. *See Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382 (1997). The summary judgment evidence presented below showed that the HISD Board of Education adopted specific policies and procedures to protect the safety and welfare of students and that HISD did not maintain a policy or custom of ignoring complaints about sexual abuse but, rather, investigated complaints and disciplined or terminated alleged violators. The reinstatement of Asher after his 1987 acquittal is insufficient to generate a question of fact on the question of deliberate indifference. *See, e.g., Jones v. Wellham*, 104 F.3d 620 (11th Cir. 1997) (plaintiff alleged that she was raped by a police officer; county could not be held liable even though the police officer had been accused of rape 11 years earlier); *Jones v. City of Chicago*, 787 F.2d 200, 203 (7th Cir. 1986) (city could not be held liable for retaining a doctor who had previously been investigated and cleared of a sexual assault claim when he allegedly sexually assaulted a second woman).

Regardless of the merits of Becerra's arguments, because numerous other grounds justify summary judgment in this case, granting certiorari would be futile. Therefore, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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